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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1132

FLORISTS' NATIONWIDE TELEPHONE DELIVERY NETWORK—AMERICA'S PHONE-ORDER FLORISTS, INC., A CORPORATION,

Petitioner,

vs.

FLORISTS' TELEGRAPH DELIVERY ASSOCIATION, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists, Inc. (FNTDN) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on January 3, 1967.

CITATIONS TO OPINIONS BELOW.

The District Court rendered no opinion in entering judgment in favor of petitioner on its treble damage claim but entered findings of fact and conclusions of law in sub-

sequently denying petitioner injunctive relief. The findings and conclusions are printed in Appendix B hereto, *infra*, p. 38. The opinion of the Court of Appeals is as yet unpublished but is printed in Appendix B hereto, *infra*, p. 23.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 3, 1967 (App. B, *infra*, p. 37). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a plaintiff's "unclean hands", if established, bar it from recovery of damages and injunctive relief in a private antitrust action.

2. Whether a trade association may legally excuse or defend the adoption of rules which prohibit its members from using a competitor's services on the ground that such competitor's services constitute unfair competition.

3. Whether a small businessman who has won a jury verdict and judgment in an antitrust treble damage action should be put to the delay and expense of a second trial solely because the District Court did not give specific instructions to the jury on defendant's "unclean hands" theory of defense which instructions were in conflict with decisions of this Court.

STATUTES INVOLVED.

The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 & 2, and Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 & 26. The foregoing statutes are printed in Appendix A, *infra*, p. 21.

STATEMENT.

This is a private antitrust action in which petitioner FNTDN recovered a $450,000 treble damage judgment following a three-week jury trial. The court below reversed the judgment and remanded the damage claim for a new trial on the ground that respondent's "unclean hands" defense, if established, barred recovery of damages and that the District Court committed prejudicial error in not specifically instructing the jury on this theory of defense.[1]

The case involves the business of providing services to retail florists for facilitating and promoting the inter-city exchange of flower orders. Petitioner sells flowers-by-wire services for profit. Respondent provides such services to its members as one of its trade association functions.

Respondent Florists' Telegraph Delivery Association (FTD) is the oldest and largest retail florist trade association in the United States. FTD was organized in 1910 as a voluntary association and was later incorporated as a Michigan not-for-profit membership corporation. Its membership is composed of approximately 11,000 retail florists or about one-half of the 22,000 retail florists in the United States (App. B, *infra*, p. 25).

Under the FTD by-laws members delegate the management of their association to an elected board of directors. The members agree to be bound by any and all by-laws and membership rules adopted by the board. Violation of

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1. The court held: "The core of FTD's defense to both the damage claim and the claim for equitable (injunctive) relief is that . . . FNTDN's purpose and conduct preclude it from recovery on its damage claim and bar it from equitable relief under the 'clean hands' doctrine. Such defense, if established, would so bar FNTDN from both recovery of damages and injunctive relief" (App. B, *infra*, pp. 27, 28).

any by-law or membership rule subjects the offending member to loss of membership (Ex. R. 2-9).[2]

For years FTD enforced a rule, known as the dual membership rule, which prohibited FTD members from belonging to or using the services of competing flowers-by-wire organizations. This rule, among other practices, was challenged by the government in a civil action under the antitrust laws. The action was terminated in 1956 with entry of a consent decree which enjoined FTD from prohibiting dual membership or otherwise restricting the terms or conditions upon which FTD members could do business with other organizations (R. 292-5). FTD also enforced a rule, known as the mandatory clearinghouse rule, which required FTD members "to report to and clear through" the FTD clearinghouse all orders exchanged between them.[3] The latter rule was not challenged in the government action and remained in force until 1964 (R. 66-7; Ex. R. 35-6).

In 1958, following abolition of the dual membership rule, petitioner FNTDN was organized by Thomas J. O'Brien, a wholesale-retail florist, to sell flowers-by-wire services for a fee. FNTDN's services were offered on a subscription basis to one top-flight florist in each principal city in the United States (R. 68, 73-4). Such florists invariably were also members of FTD.[4] Two of the services FNTDN offered its subscribers were regarded by FTD as a form of unfair competition and provoked the antitrust violation in the case.

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2. "R." refers to volumes I and II of petitioner's appendix in the court below. "Ex. R." refers to volume III of petitioner's appendix in the court below.

3. FTD charges a 5% fee for this clearing service which fee is the principal source of its operating income. In 1961 FTD received fees totaling $3,309,557 for clearing $66,191,147 in intercity flower orders (R. 66; Ex. R. 76).

4. As FTD conceded and the court below acknowledged, FTD's 11,000 membership included the leading florists in every significant community in the United States (R. 220-1; Ex. R. 57; App. B, *infra*, p. 25).

First, FNTDN offered a directory of its subscribers for use in the selection of florists to fill inter-city flower orders. Petitioner represented that the florist listed for each city was the best or a leading florist who would reliably fill an order with top quality flowers. Petitioner encouraged its subscribers to use its directory when selecting out-of-town florists but imposed no requirement for such use (R. 178-82). FTD's comparable directory included its entire 11,000 membership with as many as 160 members listed in some cities. FTD's directory provided no information which would assist a user in making a selection from among the listed members (R. 63-4).

At the trial respondent contended that the purpose of petitioner's directory was to induce a boycott by encouraging the exchange of flower orders between petitioner's subscribers to the exclusion of other FTD florists (App. B, *infra*, pp. 27, 28). Respondent further contended that FTD's clearing facilities were being misused because orders exchanged between subscribers using petitioner's directory were being cleared through the FTD clearinghouse (App. B, *infra*, pp. 27, 28).[5]

Second, petitioner provided dual advertisements in local telephone directory yellow pages in order to generate wire order business for its local subscriber. The advertisements contained the copy, "To send flowers anywhere, call AMERICA'S PHONE-ORDER FLORISTS. (No charge account

5. FTD's general manager at trial admitted that FTD's clearinghouse statistics disclosed no boycott by petitioner's subscribers but indicated "a possible trend toward non-FNTDN members possibly effecting a silent boycott in directing their orders" (R. 224-5; Ex. R. 48).

The evidence also disclosed that FTD's counsel had advised FTD's general manager that the mandatory clearinghouse rule not only permitted but required petitioner's subscribers, in their dual capacity as FTD members, to clear orders through the FTD clearinghouse (Ex. R. 35-6). Petitioner did not offer a competing clearing facility for this reason (R. 108, 118-9, 175-6). Petitioner's subscribers, as dual FTD members, paid FTD a 5% fee on all orders exchanged between them and cleared through the FTD clearinghouse.

needed) Just Order By Phone—Pay By Mail!—Phonaflower!" They listed the name, address and telephone number of petitioner's "Exclusive Representative" in that city (Ex. R. 10-11). FTD for a time purchased similar yellow page advertisements under its trade name. FTD's advertisements, however, listed all of its members in a particular city (R. 87-8).

At the trial respondent contended that petitioner's yellow page advertising described its exclusive representatives in such a manner and context as to mislead the public into believing that the FNTDN subscriber was the only local florist offering flowers-by-wire services or was an FTD member preferred by FTD over its other members (App. B, *infra*, p. 28).[6]

The pertinent trial evidence established that in a matter of months following petitioner's organization, FTD's general manager reported to the FTD board that petitioner "could pose problems" to FTD and that he would "continue to G-2 the situation" (R. 185-6; Ex. R. 26-8). It was generally agreed that FNTDN "could be a very disruptive influence on FTD", and that "very careful surveillance should continue on this operation" (R. 189-90; Ex. R. 29).

FTD members complained to FTD headquarters to do something about petitioner's allegedly unfair competition. The gist of these complaints was that FTD members who were subscribers of petitioner enjoyed an unfair advantage over their fellow FTD florists because petitioner's di-

6. This contention was made notwithstanding the fact that no mention of FTD appeared anywhere in petitioner's advertisement; that FTD's counsel advised FTD's general manager that he found no element of affirmative misrepresentation in the advertisement; and that no evidence was offered of actual consumer confusion (Ex. R. 35-6). Respondent, however, contended that deception was intended because FNTDN's president had said that readers "assume[d] right off the bat that we are the organization" (App. B, *infra*, p. 31). Petitioner invites the court to inspect its advertisements (Ex. R. 10-11).

rectory and yellow page advertisements made the listed florists the target for additional inter-city flower business (R. 192-3, 265-6, Ex. R. 30-4).

FTD's lawyer first advised caution but this advice gave way under member pressure for action.[7] At the August, 1960 FTD convention, FTD member Sheets proposed that a list of petitioner's subscribers be placed in the monthly FTD magazine so that loyal FTD members could identify these people and act accordingly (R. 388-94; 448).

Following the 1960 convention, FTD president Joseph Hynes told the association's general manager, "Damn it, John, you damn well better do something about this", referring to the petitioner (R. 223).

Accordingly, the FTD board adopted and published to the membership "effective immediately" in July, 1961, two rules which provided (Ex. R. 14, 52, 54):

> "No Active Member shall permit the publication of his shop name as a part of any list or directory of FTD florists a purpose of which is to encourage or influence Active Members appearing on said list or in said directory to exchange orders between themselves to the exclusion of other Active Members of FTD."; and
>
> "No Active Member shall advertise or hold out to the public in any manner with respect to flowers-by-wire orders that he offers an exclusive flowers-by-wire service, when other FTD members offer FTD service in the same area."

Petitioner's subscribers correctly understood that these rules were designed and intended to prevent them and other FTD florists from using FNTDN's directory and advertising services. As the court below observed, "FNTDN experienced a decline in its membership and an increase in the percentage of rejections in connection with franchises

7. FTD's counsel in October, 1959, advised the FTD board that "There is no way . . . we can exclude or prohibit members of FTD from participating in competing organizations and in a way that is what FNTDN is. It is legal and there is nothing we can do to prevent it" (Ex. R. 57).

offered to prospective members" (App. B, *infra*, p. 27). In fact, within a period of eighteen months all but seven of FNTDN's subscribers in three hundred cities had either resigned or permitted their FNTDN franchises to lapse at the renewal dates (App. B, *infra*, p. 27; R. 104-8; Ex. R. 15-24). FTD's rules were never revoked, modified, or suspended and continue in effect today (R. 343).

Petitioner's complaint alleged that FTD and its member co-conspirators had engaged in a continuing combination and conspiracy to unreasonably restrain trade in, and to monopolize or attempt to monopolize for FTD, the business of providing flower wire order services to retail florists in violation of Sections 1 and 2 of the Sherman Act (15 U. S. C. §§ 1, 2). The complaint alleged that the above-quoted rules were designed and intended to prevent FTD members from using petitioner's directory and yellow page services in order to eliminate petitioner as a competitor in the flowers-by-wire business (R. 29-30). The evidence that the rules were so intended convinced the jury.

FTD director Gifford testified that at the board meeting when the rules were adopted, during which no minutes were kept, "it was stated many times in the executive session that [the adoption of the membership rules] would have a serious effect on FNTDN" (R. 143-8). Following announcement of the rules, FTD's general manager Bodette admitted to petitioner's president that it "seemed to be obvious" that the rules "were aimed at his organization" (Ex. R. 49; R. 227-8). When petitioner's president said that the rules would put petitioner out of business, Bodette replied that FNTDN "will have to take it to court" (R. 94).

At the August, 1961 FTD convention, Bodette remarked that the new rules came about as a result of the remarks made on the floor of the convention the preceding year, at which Sheets had proposed a boycott (R. 98, 229-30). Bodette further wrote (Ex. R. 50):

"Yes, the new rules are aimed at FTD members who belong to other organizations. We will spell out the application of the rules in some detail after the membership committee meets in Montreal . . . However, there is no doubt that they are aimed at FNTDN . . ."

Former FTD president Minshall testified that it was said by an FTD district representative that the rules "were expressly intended to stop FTD members from joining the organization that is now suing FTD", referring to petitioner (R. 353-6). And FTD director Clemenson admitted that he voted for the rules to "block the network", referring to petitioner (R. 98-102).

Respondent's jury defense was that the rules were reasonable measures to protect its members from petitioner's unfair trade practices (the alleged boycott and misleading advertising). It disclaimed any intent to injure or destroy petitioner's business (App. B, *infra*, pp. 27, 28). All of respondent's evidence on this theory of defense was admitted by the trial court and FTD's counsel argued its position fully to the jury (R. 56-7, 441-54).[8]

8. Respondent also placed in evidence, with the District Court's approval and over petitioner's objection, correspondence with the Antitrust Division of the Department of Justice, which FTD claimed expressly cleared and approved the membership rules which put petitioner out of business (R. 149-53, 302-7, 451). This contention was made notwithstanding a 1963 Justice Department letter to the effect that the rules would violate the 1956 consent decree if interpreted and applied in a manner which prohibited FTD members from using the flowers-by-wire services of a competitor (Ex. R. 85-6).

In the court below respondent reiterated its claim that the rules had been cleared by Justice. The Justice Department filed a memorandum *amicus curiae* in the court below denying that any such clearance had been granted and stating that it only advised FTD on the basis of the latter's *ex parte* submission that the Antitrust Division would take no action under the consent decree by reason of the adoption of the rules (see footnote reference to the government's memorandum *amicus curiae* in the opinion of the court below at App. B, *infra*, p. 36). A copy of the government's *amicus* memorandum is transmitted with this petition.

On August 1, 1966, the Department of Justice filed a new civil complaint, alleging that FTD was conspiring to "police and re-

The court, over petitioner's objection, instructed the jury that "the antitrust laws do not prevent trade associations from adopting reasonable rules and regulations to protect their interstate trade and commerce from destructive and injurious practices of competitors when the purpose is to promote competition upon a sound basis" (R. 467, 458). The court, over petitioner's objection, further instructed the jury that the membership rules on their face were not unlawful, regardless of their effect on petitioner's business, and would be unlawful only in the event the jury found that the rules were "adopted and published with the *specific* intent of destroying plaintiff's business" (R. 467, 458).[9]

On the issue thus framed, the jury returned a $150,000 general verdict in favor of petitioner. The District Court denied respondent's motion for judgment notwithstanding the verdict or alternatively for a new trial and entered judgment on the verdict. The District Court, however, entered findings of fact and conclusions of law and a separate judgment denying petitioner injunctive relief.[10]

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strict the competitive activities of member florists, including their advertising practices, affiliation with directories and lists of competitive floral associations . . . .". *United States* v. *Florists Transworld Delivery Assn.* (E. D. S. D. Mich, Civ. No. 28784) 5 CCH Trade Reg. Rep. ¶ 45,066 (Case 1904).

9. In the hearing on instructions, respondent's counsel argued that intent was the key to the violation. He stated, "If it was intent, intent to drive you out of business, the rule is bad. But the rule is perfectly lawful on its face. Our defense is that there wasn't such intent. That is what we are fighting about, intent" (See p. 2-A of petitioner's supplemental appendix attached to its answer and reply brief in the consolidated appeals in the court below). The District Court's entire charge appears at R. 458-69.

10. The court below reversed the District Court's judgment denying injunctive relief on the ground that the District Court was estopped from entering findings contrary to the jury verdict (petitioner's consolidated appeal No. 15719). The court below nevertheless declared that on new trial respondent's unclean hands defense, if established, would bar recovery of injunctive relief as well as damages (App. B, *infra*, p. 28).

On appeal from the money judgment respondent conceded that the complaint stated a claim for relief under the antitrust laws; that no error had occurred in the reception or rejection of evidence; that all of its evidence concerning petitioner's unfair practices had been before the jury; that no error existed with respect to any instructions actually given; and that, assuming the jury had been adequately instructed, sufficient evidence existed to support the verdict.[11]

FTD appealed and the court below reversed solely on the ground that the trial court committed prejudicial error in failing to give three instructions which further and more fully detailed defendant's "unclean hands" theory of defense.[12] The three instructions which the court below held should have been given are reproduced in the margin below.[13]

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11. See briefs in the court below, copies of which have been transmitted with this petition. See also Appendix B, *infra*, p. 25.

12. Respondent also made a perfunctory argument that the damage amount was speculative. The Court of Appeals finds this contention to be without merit (App. B, *infra*, pp. 33-4).

13. *Defendant's Requested Jury Instruction No. 18:*
"Defendant FTD, on the other hand, claims that it neither threatened, or engaged in, a boycott of plaintiff's franchisees; and that it neither threatened nor took disciplinary action against its members who were franchisees of plaintiff. Further, defendant denies that it adopted its membership rules with the intent or design claimed by plaintiff. *Defendant concedes that the rules were aimed at practices of the plaintiff which it alleges were injurious to competition among its member florists and contrary to public policy, if not illegal.* These practices of the plaintiff, claims the defendant, were against public policy because: (a) The yellow page ads placed by the plaintiff for its franchisees *were* intentionally designed by the plaintiff to deceive the flower buying public into believing that plaintiff's franchisee was the exclusive representative of the defendant FTD and the only florist in the community who could send flowers-by-wire; (b) These same yellow page ads *were* intentionally designed by the plaintiff to deceive the flower buying public into believing that the plaintiff's franchisee was offering to accept flowers-by-wire orders on credit from anyone, regardless of whether the purchaser was a good

In the tendered instructions respondent "concede[d] that the rules were aimed at the practices of the plaintiff" and were intended to protect "competition among its member florists" by prohibiting them from using petitioner's directory and yellow page services. These instructions, the court below declared, set forth respondent's "unclean hands" defense theory "that FNTDN was engaged in a boycott of other FTD members; that FNTDN was deceptively advertising its members as exclusive wire order florists and preferred FTD members; that FTD's intent in adopting the rules in issue was not to destroy FNTDN's business, but to protect FTD's members against FNTDN's boycott and deceptive activities" (App. B, *infra*, p. 32).

Acknowledging that the District Court gave respondent's

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credit risk; and (c) The plaintiff's directory listed FTD members who had purchased plaintiff's franchises *for the purpose* of encouraging or influencing those members to exchange orders between themselves to the exclusion of all other FTD members. Defendant claims that plaintiff was thereby promoting a boycott by the plaintiff's franchisees of other members of FTD. Defendant asserts that it acted at all times in good faith and took every reasonable precaution to assure the legality of its actions" (Emphasis added).

Defendant's Requested Jury Instruction No. 29:

"In considering whether these rules were specifically intended to drive the plaintiff out of business or were intended to be only a reasonable means to protect interstate trade and commerce in flowers-by-wire orders from destructive and injurious practices, you may consider whether FTD, in good faith, *believed* that: (a) The purpose of the plaintiff's roster was to encourage or influence FTD members who had purchased plaintiff's franchises to exchange flowers-by-wire orders between themselves to the exclusion of other members of FTD; and (b) the yellow page ads of the plaintiff intended to deceive the public into believing that it was only the plaintiff's franchised florist who offered flowers-by-wire in the community" (Emphasis added).

Defendant's Requested Jury Instruction No. 29A:

"In considering whether the acts of defendant were intended to be only a reasonable means to protect interstate trade and commerce from destructive and injurious practices, you may consider all of the surrounding facts and circumstances of which FTD had knownedge or which FTD reasonably *believed* to exist." (Emphasis added).

general instructions on its unclean hands defense, the court below nevertheless held that, "The [district] court gave no instruction specifically setting forth or relating to FTD's theory of defense" and thereby committed reversible error requiring a new trial (App. B, *infra,* pp. 32-3).

REASONS FOR GRANTING THE WRIT.

I.

The decision of the court below sustaining respondent's "unclean hands" defense directly conflicts with the decisions of this Court in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U. S. 211, and *Moore* v. *Mead Service Co.,* 340 U. S. 944. The court below sought to distinguish *Kiefer-Stewart* and "similar decisions" on the ground that "the unclean hands defense here asserted does not relate to a transaction or subject matter other than the one in suit." It observed, "both FNTDN's activities and FTD's challenged rules were concerned with the same transactions—the distribution and processing of inter-city flowers-by-wire orders by FTD members via the FTD clearinghouse" (App. B, *infra,* p. 29). Petitioner submits that the attempted distinction does not resolve the conflict.

In *Kiefer-Stewart* respondents alleged as a defense and justification for their concerted refusal to sell liquor to petitioner the fact that petitioner was engaged in an illegal price fixing conspiracy with other wholesalers to fix liquor prices in excess of the maximum prices suggested by respondents. The trial court, however, instructed the jury that petitioner's part in such a conspiracy, even if proved, constituted no defense to the action. This Court agreed, stating:

> "If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the government or by injured private persons. The al-

leged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured. Cf. *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, . . ." (340 U. S. 214.)

In *Moore* the respondent similarly contended that it had cut bread prices in Santa Rosa, New Mexico while maintaining higher prices elsewhere in order to break a boycott of local grocers induced by his competitor, the petitioner before this Court. The Court of Appeals for the Tenth Circuit held "that the plaintiff by his own conduct and participation in an illegal boycott had created a condition which resulted in the price discrimination complained of and for that reason could not maintain the action" (184 F. 2d 338, 190 F. 2d 540, 541). This Court in a *per curiam* opinion vacated the judgment and remanded the case for further consideration in light of *Kiefer-Stewart.*

The unclean hands defense in *Kiefer-Stewart* and *Moore,* contrary to the court below, did not relate to a transaction or subject matter other than the one in suit. In each case plaintiff's conduct was urged as a defense because such conduct had created the very controversy which precipitated the defendant's violation. Nevertheless, this Court held that such alleged conduct, whether price fixing as in *Kiefer-Stewart,* boycotting as in *Moore,* or boycotting and misleading advertising as in the instant case, cannot excuse a retaliatory antitrust violation and thereby bar recovery of damages for injury to the plaintiff's business or property. Public interest in enforcement of the antitrust laws is paramount and may not be neutralized by permitting plaintiff's antitrust violation to cancel out defendant's violation so that the public is "caught in the cross-fire" of the wrongful conduct of the litigants. *Trebuhs Realty Co.* v. *News Syndicate Co.* (S. D. N. Y., 1957), 107 F. Supp. 595, 601.

This Court's reference to *Fashion Originators' Guild v. Federal Trade Com.*, 312 U. S. 457, in *Kiefer-Stewart* indicates that the decision below also conflicts in principle with the *Fashion Originators'* precedent. In the latter case this Court held that style piracy (the intentional copying and sale of original design clothing at cut-rate prices) could not excuse or justify the Guild's attempt to control such allegedly unfair trade practices by refusing to deal with retailers selling pirated garments.

The Guild sought to justify its efforts on the identical ground adopted as the basis for decision by the court below. The Guild contended that "the practices of F. O. G. A. were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against devastating evils occurring from the pirating of original designs, and had, in fact, benefited all four." The court below similarly reasoned that FTD might justifiably and lawfully adopt rules prohibiting its 11,000 florist members from using petitioner's directory and advertising services in the event such services were unfair or deceptive or injurious to fair competition.

Such attempted justification of a concerted refusal to deal was emphatically rejected in *Fashion Originators'* and should be similarly rejected here. Even if FNTDN's alleged boycott and misleading advertising "were acknowledged torts under the law of every state, that situation would not justify [FTD's membership] in combining together to regulate and restrain interstate commerce in violation of federal law" (312 U. S. 468). FTD in the florist industry, like the Guild in the fashion world, "is in reality an extra-governmental agency, which prescribes rules for the regulation and restraining of interstate commerce . . ." (312 U. S. 465). FTD no more than the Guild may lawfully constitute itself "an extra-judicial tribunal" and adjudicate the fairness of the business practices of competitors as admittedly was attempted in this case.

II.

The decision of the court below, in adding "requirements to burden the private litigant beyond what is specifically set forth by Congress"[14] in the antitrust laws, conflicts in principle with the decisions of this Court in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, and *Radiant Burners* v. *Peoples Gas L. & Coke Co.*, 364 U. S. 656.

In *Klor's* this Court held that a plaintiff who claimed injury to his business and property proximately caused by a concerted refusal to deal was not obliged to establish further that the public had also suffered some special injury by reason of his inability to do business. Such a restraint was "not to be tolerated because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy" (359 U. S. 213).

Faced with a similar concerted refusal to deal complaint in *Radiant*, this Court held that the Court of Appeals for the Seventh Circuit could not require the plaintiff to prove in addition to an unlawful restraint and consequent damage "that the public has been deprived of a product of overall-superiority" (364 U. S. 659).

Contrary to those decisions the "unclean hands" defense approved by the court below in effect requires petitioner to persuade a second jury that it did not engage in the unfair trade practices charged by the respondent. Where the defense of unclean hands is interposed, the court below holds that a private litigant must establish to the satisfaction of the trier of fact, not only a statutory violation and injury to its business and property but a third element as well, namely, the propriety of its business conduct.

Petitioner submits that the court below thereby judicially

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14. *Radovich* v. *National Football League*, 352 U. S. 445, 454.

interpolated an added requirement beyond that set forth by the Congress in Section 4 of the Clayton Act. Such interpolated requirement, if allowed to stand in this case, will serve to defeat private actions just as the public injury doctrine did before this Court's decisions in the *Klor's* and *Radiant* cases.[15]

III.

The circumstances of this case warrant the exercise of this Court's supervisory power because the court below has remanded the case for a second and unnecessary trial on a theory of defense squarely in conflict with the decisions of this Court. Such a superfluous trial, in terms of further delay and expense, places an intolerable burden upon the petitioner.

It is undisputed and the court below acknowledges that FTD's membership rules had an immediate and continuing impact on petitioner's business (App. B, *infra*, p. 27).[16] Within a matter of months all but seven of petitioner's 300 subscribers had either resigned or let their memberships lapse at the first renewal date following announcement of the rules (App. B, *infra*, p. 27). The rules have never been revoked, modified, or suspended, and continue in force today (R. 343).

At the time of the announcement of the rules in July, 1961, petitioner's president complained to FTD's general manager, Bodette, that the rules would put petitioner out

15. Compare the Seventh Circuit's recent decision in *Crest Auto Supplies, Inc.* v. *Ero Manufacturing Company* (C. A. 7, 1966), 360 F. 2d 896, 900, holding that "where a plaintiff participates freely in the alleged anti-trust conduct, the *pari delicto* rule precludes recovery." The court held that a dealer was so barred from recovery of damages resulting from an exclusive dealing requirement in his dealer's franchise contract voluntarily entered into with defendant.

16. In the court below respondent conceded the "fact of damage." See briefs filed in the court below.

of business, and Bodette replied, "[You] will have to take it to court" (R. 94).

Petitioner filed the instant action two months later, in September, 1961. Discovery was taken and petitioner pressed for an early trial because of the continuing impact of the rules on its business. The case was not tried, however, until January, 1966.[17] During all of this period petitioner was out of business.

This court is aware of the large expense involved in antitrust litigation.[18] The instant trial took three weeks. There is no reason to believe that a second trial will take any less time. Few litigants can afford the expense of one three-week trial, let alone a second trial.

Petitioner is a small businessman. For six years it has diligently prosecuted its lawsuit in a so far futile attempt to secure relief from a continuing antitrust violation and to restore its business as a going concern.

Unless reversed, the decision below will require petitioner to stand the further delay and expense of a second trial on a theory of defense which flies in the teeth of this Court's decisions and which a jury has already seen fit to reject. Should respondent on remand secure a jury verdict on this false theory and should this Court then grant certiorari, the only relief the Court could give would be to remand the case for a third trial.

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17. The case was initially set for trial in October, 1963. This setting was vacated and thereafter, over a two-year period, the District Judge set the case for trial on fifteen separate occasions. These trial dates were subsequently vacated by the District Judge on his own motion. The case was finally tried in January, 1966, only after petitioner filed a motion with the District Judge requesting that he transfer the case to the Court's Executive Committee for reassignment because of its inability to get a trial. The motion to transfer and reassign was denied on January 24, 1966. The motion was not printed in petitioner's appendix in the court below but a certified copy has been transmitted with this petition.

18. The taxable costs alone in the courts below were in excess of $13,500.

Under these circumstances the interlocutory character of the decision below should not be a ground for denying certiorari. This Court has held that where an important and clear-cut issue of law is presented which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, the case may be properly reviewed despite its interlocutory status. *United States* v. *General Motors Corp.*, 323 U. S. 373, 377; Cf. *Simpson* v. *Union Oil Co.*, 377 U. S. 13. The instant case, petitioner submits, presents such a clear-cut issue of law.

Unless the court grants certiorari at this time, petitioner will be financially exhausted before this already protracted litigation reaches a conclusion.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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